86-479

No. 86

Supreme Court, U.S.
FILED
SEP 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term 1986

Bill J. Cory,

Petitioner

v.

Uniroyal, Inc.,

Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

Bill J. Cory, Pro Se
Apartment 204
2574 Chain Bridge Road
Vienna, Virginia 22180
(703) 938-3589

QUESTION PRESENTED

Whether the right to trial by jury as provided for by the Seventh Admendment to the Constitution of the United States was violated since the facts of the case had never before been presented or decided upon their merits; and res judicata or collateral estoppel could not be properly invoked by the courts below.

[1] J.P. Flannery, President of Uniroyal, Inc., is a defendant in this action.

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for the Fourth Circuit

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on 22 May 1986.

OPINIONS BELOW

The 22 May opinion of the Court of Appeals for the Fourth Circuit whose judgment is herein sought to be reviewed is reprinted in the Appendix to this

Petition, pp. 1-5. The prior opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division are also reprinted in the Appendix, pp. 8-21.

JURISDICTION

The judgment of the Court of Appeals was entered 22 May 1986. A timely petition for rehearing was denied on 17 June 1986 (Appendix, p. 22). The jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Seventh Admendment to the Constitution of the United States which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATEMENT OF CASE

This case involves a conspiracy by Uniroyal, Inc., and independent dealers of Uniroyal tires who

implemented a widespread scheme to defraud the Public by using false and misleading tire warranties. In the mid-1970's the automobile industry decided to put steel belted radial tires on its new cars as original equipment. To meet this demand and since the majority of General Motors cars were equipped with Uniroyal tires, Uniroyal fraudently placed steel belted radial tires in the marketplace knowing full well from quality assurance and field tests that they did not know the proper design and construction techniques, and fabrication process to make 'usable on the road' safe tires of this type. As a consequence, Uniroyal knew large numbers of defective tires would be replaced under warranty and, accordingly devised a warranty scheme using inflated replacement tire prices not only to cover losses but increase profits through captive buyers of replacement tires.

In March 1980, the National Highway Traffic Safety Administration (NHTSA) caused Uniroyal to recall approximately ten million tires for safety related defects pursuant to the National Traffic and Motor Vehicle Safety Act (NHTSA, Office of Defects

Investigation (ODI) Case C9-19). The Petitioner had five original equipment tires and one replacement tire blow out due to tread separation, the same defect that initiated the NHTSA recall. In review of NHTSA Case ODI C9-19, the Petitioner found that his 70-series tires were manufactured within the time limits specified for recall, but had not been recalled because Uniroyal convinced NHTSA that this tire size would unnecessarily complicate the paperwork.[2]

The Petitioner was charged pro rata the inflated replacement tire price from the "then current Uniroyal Adjustment Base Price List" (ABPL) for defective tires #4 and #5. The warranty is devoid of standards for pricing replacement tires and the

[2] From ODI Case C9-19, Letter from Uniroyal to NHTSA:

> "Collectively these various nonstandard tires comprise only a minor portion of the volume of the Zeta 40 PR6 and the TPC PR6 lines, and much of it is in recent production.
> Consideration of this material seems outside the scope of the inquiry. Full inclusion of it would have unnecessarily complicated many of our answers.
> . . ., but we have omitted the aberrent 60 series, 70 series, and P-metric tires from analysis and consideration in regard to the other questions."

unsuspecting customer does not know that the ABPL quoted prices 30-100% higher than the dealers floor price for the same tire. Further, the ABPL was fraudently applied and the Petitioner was charged for two tires that were higher in price than the tires received. The tires actually placed on the vehicle normally sell for $60, but on this day were held for sale on the dealer's floor for $71.95 each. Upon examination of the Uniroyal ABPL's submitted for trial, the price listed for the same tires was $82.44. The Petitioner was charged and paid Uniroyal at a rate of $96.75 per tire. Uniroyal has continuously denied wrongdoing.

The fraudulent scheme of Uniroyal encompassed the issuance of warranties which were fashioned to mislead the purchaser and beguile him into believing that he could purchase a replacement tire for a pro rata share close to the original cost of the tire or a similarly reasonable price, such as the dealer's current selling price on the floor. Actually, Uniroyal required that the ABPL be used which contained prices far in

excess of dealer floor prices or any price that a reasonable man could foresee.

The Petitioner learned, after tire #6 blew out, of the NHTSA recall in June 1985, and subsequently filed suit under Title 18 U.S.C., Section 1961 et seq., RICO, in United States District Court for the Eastern District of Virginia, Alexandria Division. Previously in 1984, and after original equipment tires #4 and #5 blew out on the same night, the Petitioner had filed a Warrant in Debt in General District Court of Fairfax County (App. 24) for $235.22, the cost of replacing five (5) unmerchantable tires under the terms of the Uniroyal warranty and $1000.00 punitive damages. The U.S. District Court held that the Petitioner was barred by res judicata and thus collaterally estopped from litigating the issue (App. pp. 8-21). The U.S. Court of Appeals for the Fourth Circuit affirmed (App. pp. 1-5) and a timely Petition for Rehearing was denied on 17 June 1986 (App. pp. 22-23).

REASONS FOR GRANTING THE PETITION

Fraudulent and misleading warranties are paid for by the Public and act as an unfair trade restriction

against corporations who use good business practices. As a matter of public policy the courts must continue to promote consumer welfare, fair competition, and provide a means of action against those who injure competition and coerce consumers. Product warranties are of increasing economic importance to consumers. Therefore the desired result of this suit is to address the requirement of standards in warranties and to provide the Public with established recourse in the courts in the event of a large-scale warranty violation such as Uniroyal.

The decision of the trial court denied the Petitioner his right to have the facts of this case tried by jury as provided for by the Seventh Amendment. The court decision is contrary to the decisions of this Court which has stated that the facts must have been tried and that a most significant safeguard is the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate. Parklane Hosiery v. Shore, 439 U.S. 331 (1979). The Seventh Circuit in Ray v. Indiana & Michigan Elec. Co., 758 F.2d 1148(1985) listed four

conditions that must be established to invoke the doctrine of collateral estoppel:

(1) A final determination on the merits must have been reached in the case;

(2) The issues for which estoppel are sought must have been essential to that decision;

(3) The party against whom estoppel is invoked must have had full opportunity to address the issues in that case; and

(4) The issues must be identical to the issues in the case in which estoppel is sought.

In January 1985, in General District Court of Fairfax County, the Petitioner sued Uniroyal by Warrant in Debt (App. p. 24) for $235.22, the cost of replacing five (5) unmerchantable tires under the terms of the Uniroyal warranty and $1000.00 punitive damages. The Petitioner was the only witness at trial and he was not allowed to testify as to the merchantibility of the tires since he was not qualified as an expert witness on tires. The tires were not in evidence since they had been returned to Uniroyal under the terms of the warranty. No evidence was

presented and the case was never tried on its merits. The trial court granted a judgment for the defense on a motion to strike. In the case of five (5) unmerchantable tires a final judgment on the merits was never rendered in General District Court, and, therefore collateral estoppel or res judicata cannot be applied to this present case.

There is no identity of the cause of action in the present case to the "unmerchantible tires" cause of action in State court. The current case is a RICO claim alleging fraud and conspiracy. This case was brought on new evidence: two replacement tires have blown out and NHTSA Case C9-19, the Uniroyal recall was discovered.

The Petitioner would not have been permitted to bring this Cause of Action in General District Court since only federal courts have jurisdiction over RICO claims. (Greenview Trading Co., Inc. v. Hershman & Leicher, No. 22790, N.Y. App. Div., 1st Dept., 6/3/85; Main Rusk Associates v. Interior Space Constructors, Inc., No. 01-85-0400-CY, Tex. Ct. App., 1st Dist., 10/10/85). In fact, the courts have held that a fraud

claim in State Court is not an identical cause of action for fraud under RICO. (Ralston v. Copper, D.C. Mich. 1983, 569 F. Supp. 1975.)

Jury trial in General District Court is prohibited by the Constitution of Virginia. Trial by jury was demanded for the RICO claim.

The trial court decision was far afield from the principles that have led this Court to describe that one must have full and fair opportunity to litigate the facts and receive judgment based upon the merits. The Petitioner believes this case presents an appropriate opportunity for this Court to confirm the validity of many judicial decisions and reaffirm the right to trial by jury still exists under the Constitution of the United States of America.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and the decision of the Court below reversed and remanded.

Respectfully submitted,

Bill J. Cory, Pro Se
Apartment 204
2574 Chain Bridge Road
Vienna, Virginia 22180
(703) 938-3589

12 September 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1023

Bill J. Cory,

Appellant,

versus

Uniroyal, Inc.,

Appellee,

and

J.P. Flannery,
President, Uniroyal, Inc.,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A No. 85-728-A)

Submitted: April 28, 1986 Decided: May 22, 1986

Before MURNAGHAN and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Bill J. Cory, Appellant Pro Se. John E. McIntosh, Jr., Boothe, Prichard & Dudley, for Appellee.)

PER CURIAM:

Bill J. Cory sued Uniroyal, Inc. in federal district court for damages allegedly arising out of the sale and replacement of defective tires. Cory brought this complaint in four counts for:

(1) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) through use of an inflated price list in connection with warranty replacements;

(2) violation of RICO through the knowing sale of defective tires;

(3) negligence in failing to recall defective tires; and

(4) failure to abide an order of the court.

The district court entered judgment for Uniroyal on all four counts with the exception that Cory's claims arising out of a May 1985 tire failure were dismissed without prejudice. We affirm.

A violation of RICO, 18 U.S.C. § 1962(c), requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., ___ U.S. ___, 53 U.S.L.W. 5034, 5038-39

(July 1, 1985). A "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). "Racketeering activity" is defined to include mail fraud, 18 U.S.C. § 1961(1), asserted by Cory to be the racketeering activity engaged in by Uniroyal.

The act of mail fraud asserted by Cory is Uniroyal's promulgation of an Adjustment Base Price List (ABPL) containing prices higher than various floor prices for the tires. Cory claims that on May 30, 1984, he had to replace two tires then under warranty, and that Jake's Tire prorated the cost of the two tires on the basis of the APBL. Because the APBL prices were higher than the floor prices, Cory's adjusted warranty price, although still lower than the floor price, was allegedly higher than it should have been. The May 30, 1984 tire purchase is the only time Cory asserts that he was overcharged due to inflated APBL prices. Therefore, even if the ABPL pricing could somehow be characterized as mail fraud, which we doubt, Cory has failed to demonstrate the requisite "two acts" of racketeering activity.

Nor has Cory stated any other type of racketeering conduct. He claims that Uniroyal sold him unmerchantable tires. As held by the district court, the issue of whether five of these tires were unmerchantable had been decided adversely to Cory in state court. As to a sixth tire, the district court found itself without jurisdiction, either under RICO or pursuant to diversity jurisdiction, to address Cory's claim that the tire was defective. Uniroyal did not, by placing an allegedly defective tire on the market, or by failing to recall that tire, engage in racketeering activity. Moreover, as Cory replaced the tire for $61.24, his claim would not meet the $10,000 jurisdictional requirement for diversity jurisdiction.

Cory also claims that Uniroyal fraudulently denied in state court that the tires were defective. Uniroyal's defense of the state court action would not, however, constitute racketeering activity within the meaning of 18 U.S.C. § 1961(1).

Cory's final claim, based upon Uniroyal's alleged non-compliance with the district court's scheduling order, is totally without merit. Finding the judgment

of the district court to be proper in all respects, we affirm. We dispense with oral argument because the facts and legal contentions are adequately developed in the materials before the Court, and argument would not aid the decisional process.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BILL J. CORY	)	
	)	
Plaintiff	)	
	)	Civil Action No. 85-728-A
v.	)	
	)	
UNIROYAL, INC.	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on defendant's motion for summary judgment. For reasons stated in the accompanying memorandum, the Court hereby GRANTS defendant's motion and enters JUDGMENT in favor of the defendant on all four counts, with the following exception. The Court specifically reserves judgment on all causes of action with respect to the failure in May 1985 of plaintiff's replacement tire, and dismisses the Complaint as to this tire failure without prejudice.

Let the Clerk send a copy of this order to plaintiff and all counsel of record.

(Jan 10, 1986)
DATE

(Richard L. Williams)
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BILL J. CORY	)	
	)	
Plaintiff	)	
	)	Civil Action No. 85-728-A
v.	)	
	)	
UNIROYAL, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on defendant's motion for summary judgment. For reasons stated below, the Court hereby GRANTS defendant's motion.

Procedural Posture of the Case:

On June 24, 1985, plaintiff filed a "Complaint for Damages" against Uniroyal and its president, Mr. J. P. Flannery, concerning certain allegedly defective tires he received as original equipment on a 1977 Pontiac. Plaintiff had purchased this Pontiac new in October 1976.

In response to plaintiff's complaint, defendants filed a motion to dismiss. The Court ruled on this motion on August 12, 1985 and granted it in part. The Court dismissed the complaint without prejudice and granted the plaintiff fifteen (15) days in which to file an amended complaint.

Plaintiff then filed an amended "Complaint for Damages" against the defendants, and the defendants in response filed another motion to dismiss. Plaintiff filed simultaneously a motion to vacate the Court's scheduling order. On September 27, 1985, this Court granted Mr. Flannery's motion, dismissing the Complaint as to him, but denied Uniroyal's motion to dismiss and plaintiff's motion to vacate the scheduling order.

Discovery has since concluded and defendant Uniroyal now comes before the Court requesting that summary judgment be entered in its favor.

Statement of Facts:

In October 1976, plaintiff purchased a new 1977 Pontiac, having as original equipment five Uniroyal PR6 WSW radial steel belted tires. About five years later, in September 1981, one of the tires failed due to tread separation. The tire was adjusted and replaced at a cost of $47.63. In April 1982, a second tire failed, again due to tread separation. Plaintiff attempted to have the tire replaced by Pan American Tires in Daytona Beach, but Pan American refused to honor the Uniroyal warranty. The tire was replaced ultimately by American Tires in Atlanta at a cost of $39.15.

At that point, plaintiff brought suit in the Fairfax County General district Court against Master Auto Service and Uniroyal for Pan American Tires' refusal to honor the Uniroyal warranty. He obtained a default judgment against both defendants in the amount of $184.00 and the judgment was satisfied.

A third tire failed in December 1983, again due to tread separation, and, pursuant to the manufacturer's warranty, was replaced by Pan

American Tires of Daytona Beach at a cost of $21.14. The two remaining tires failed in May 1984 and were replaced by Jake's Tire of Terre Haute, Indiana, at a cost of $127.30.

After these tire failures, plaintiff brought suit against Uniroyal in the Fairfax County General District Court, seeking $235.22 in compensatory damages and $1000 in punitive damages for the sale of five unmerchantible tires. Plaintiff computed the amount of compensatory damages based on the amount of money that he was charged for the five tires; he included therein what he considered an overcharge on tires number 4 and 5. (In determining the price of these latter two tires, Jake's Tire had relied on Uniroyal's Adjustment Price Index, the prices of which plaintiff insists are inflated.)

On January 2, 1985, following plaintiff's case-in-chief (which consisted only of plaintiff's own testimony), the trial court granted defendant's motion to strike the plaintiff's evidence. The trial court's order became final and was never appealed.

Unfortunately, this does not end the matter. In

May 1985, the replacement tire for the first Uniroyal tire failed due to tread separation. This time, plaintiff replaced that tire with a different manufacturer's tire at a cost of $61.24. Thereafter the plaintiff instituted the present action.

Plaintiff's amended complaint consists of four counts. Count I is a RICO claim for civil damages challenging Uniroyal's use of warranty scheme that allegedly employs inflated adjustment prices. According to plaintiff, customers who buy replacement tires under this warranty actually pay more than if they bought the same tires at retail price. The only overcharge specifically referred to involves the tires bought in May 1984 from Jake's Tire.

Count II is an action for fraud under RICO and is premised on Uniroyal knowingly having sold plaintiff defective tires. This Count refers to all the tire failures. Count III is apparently an action in tort for negligence, based primarily on Uniroyal's failure to recall the tires in question. Count IV seeks actual, compensatory and punitive damages from Uniroyal for its failure to abide by an order of this court. Plaintiff

claims that Uniroyal is in some way accountable for this Court's order dismissing plaintiff's original complaint and giving him only fifteen days to amend instead of the 27 days he requested. Because of the more limited time frame, plaintiff had to return immediately from Florida, where he was constructing a home, thereby incurring actual damages in the amount of $2570.

Discussion:

The Court grants summary judgment for defendant on all four counts. The Court dismisses the fourth count out of hand since it clearly fails to state a claim upon which relief can be granted. The other three counts require greater discussion.

The Court finds Counts I and II barred by res judicata. Count III is not so barred. However, liability on that count depends on the tires being defective, an issue already litigated in state court and adjudged against plaintiff. Plaintiff is thus collaterally estopped from relitigating that issue, and judgment must be rendered against him.[1]

There are three essential elements to res judicata. First, there must be a final judgment on the merits in an earlier suit. Second, there must be an identity of the "cause of action" in both the earlier and the later suit. And, third, there must be an identity of parties or privies in the two suits. See Nash County Board of Education v. Biltmore Company, 640 F2d 484 (4th Cir. 1981), cert. denied, 454 U.S. 878 (1981), reh'g denied, 454 U.S. 1117 (1981); Thomas v. Consolidation Coal Co., 380 F.2d 69 (4th Cir. 1967), cert. denied, 389 U.S. 1004 (1967), reh'g denied, 389 U.S. 1059 (1968).

In this case, the first element of res judicata is present since there was a final judgment in state court; the federal courts have consistently accorded preclusive effect to issues decided in state courts. See, e.g., Allen v. McCurry, 449 U.S. 90 (1980); Angel v. Bullington, 330 U.S. 183 (1947). See also 28 U.S.C. §1738. The third element is also present since the parties in both suits are identical. Thus, the third element of res judicata is present. The only remaining element in question is the second: an identity of the "cause of action."

The term "cause of action" is an elusive concept; its interpretation varies depending on the case. At times, courts look to whether the "operative facts" in the two cases are the same. See, e.g., The Haytian Republic, 154 U.S. 118 (1894). At other times, they look at whether the same primary right is asserted. See, e.g., Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). See also Nash County Board of Education, 640 F.2d at 487-88. The current trend is to look at the facts themselves to see if the two suits arise out of the same "transaction." As stated in the Restatement (Second) of Judgments, when there is a valid and final judgment on the plaintiff's claim, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of transactions, out of which the action arose." Restatement (Second) of Judgments §24 (1982)(emphasis added).

This "transactional" view of a claim describes the claim "in factual terms" and makes it "coterminus with the transaction regardless of the number of

substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights." Restatement (Second) of Judgments §24 Comment a (1982). In other words, a plaintiff has one day in court with respect to each transaction—one bite at the apple—and he cannot return day after day, presenting each time a new legal theory to support his claims. The Court finds this approach eminently reasonable and, in fact, essential given the overly litigious nature of today's society.[2]

Given this construction of the term "cause of action," counts I and II both involve the same "causes of action" as presented to the state court. Both arise out of the same transaction: (1) the sale of five allegedly defective tires and (2) the use of the Adjustment Price Index by Jake's Tire. Thus, both counts I and II are barred under the doctrine of res judicata.[3]

In Count III, plaintiff alleges that Uniroyal was negligent in failing to recall six tires at issue. Although this claim may or may not be barred under res judicata, it is at least collaterally estopped since the claim depends on the existence of defective tires. (Before any duty to recall may be imposed, the tires must be proven defective.) Under the doctrine of collateral estoppel, even if the second cause of action is based upon a different cause of action, the prior judgment precludes relitigation of issues actually litigated and necessary to the outcome of the first claim. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). See, e.g., Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974); Doummar v. Doummar, 210 Va. 189, 169 S.E.2d 454 (1969); Kemp v. Miller, 166 Va. 661, 186 S.E. 99 (1936).

The Court notes that the present suit includes an additional tire failure, one which occurred in May 1985. Plaintiff is of course entitled to sue on that occurrence since he has not yet had his day in court. However, that tire failure alone cannot support any RICO claims since RICO claims require two predicate

acts. See 18 U.S.C. 1961(5). See also U.S. v. Ruggiero, 726 F.2d 913 (2d Cir. 1984), cert. denied, — U.S. —, 105 S.Ct. 118 (1984). Nor would the Court be inclined to exercise pendent jurisdiction over a state law claim based on this tire failure. Thus, the Court dismisses without prejudice any claims that the plaintiff may have based on this final tire failure alone. Plaintiff may seek his remedies as to that tire failure in state court.

An order will issue in accordance with this opinion.

FOOTNOTES

1. Plaintiff titles Count III "Action in Tort for Negligence," but he claims jurisdiction under RICO. The Court finds it unnecessary for the purposes of this order to determine whether plaintiff has in fact stated a claim under RICO.

2. The Court recognizes that a federal court must give to a state court judgment the same preclusive

effect as would be given that judgment under the law of the state in which it was rendered. Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892 (1984). In Virginia, a judgment in a cause of action bars all subsequent proceedings upon the same cause of action between the same parties and those in privity with them, whether or not all potential issues involved were actually presented or litigated in the first proceeding. See Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974); Barkman v. Chevalier, 214 Va. 6, 196 S.E.2d 911 (1973). The "infallible" test of whether the cause of action in the second suit is the same as in the first is whether the facts essential to sustain the two suits are the same. Alderman v. Chrysler Corp., 480 F. Supp. 600 (E.D.Va 1979); Bittner v. West Virginia-Pittsburgh Coal Co., 15 F.2d 652, 655 (4th Cir. 1926); Cohen v. Power, 183 Va. 253, 32 S.E.2d 64 (1944). The Court finds that, whether or not all the facts necessary to plaintiff's present claims are identical to all of those necessary to prove his prior state law claims, the key facts in each are identical. Although there may be different factual nuances

depending on the theory of law, the plaintiff must prove in each (1) that the tires were defective; and (2) that he was overcharged. At a minimum, plaintiff's present claims are barred under the doctrine of collateral estoppel since the key factual issues have already been litigated. See Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974).

3. The Court finds it irrelevant that RICO provides for treble damages while the state common law under which plaintiff sued in state court did not. Plaintiff had the option to sue in state or federal court and he chose the state. He has thus waived his federal relief under RICO. As one commentator has noted:

> "When this choice-of-forum is present, it is difficult to justify providing immunity from estoppel effect on the ground that a litigant has the privilege to litigate under federal procedure — he has, in effect, waived any such privilege by choosing a state court in the first suit."

Note, "Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Adjudications," 53

Va. L. Rev. 1360, 1383 (1967), quoted with approval in Nash County Board of Education, 640 F.2d at 492.

Let the Clerk send a copy of this memorandum opinion to plaintiff and to all counsel of record.

(1/10/86 (Richard L. Williams)

DATE UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 86-1023

Bill J. Cory,

Appellant,

versus

Uniroyal, Inc.,

Appellee,

and

J.P. Flannery,
President, Uniroyal, Inc.,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied. [Filed June 17, 1986]

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Ervin.

For the Court,

(John M. Greacen)

CLERK

WARRANT IN DEBT

FAIRFAX COUNTY By: _____ Deputy Clerk, District Court

COURTROOM 2-A, 4110 CHAIN BRIDGE ROAD, FAIRFAX, VIRGINIA 22030

TO ANY AUTHORIZED OFFICER:

You are hereby commanded to summon the Defendant(s) to appear at

September 24, 1984 @ 9:30 AM before this Court to answer the complaint of the Plaintiff(s) upon a claim of nonpayment of a debt in the sum of

$ 235.22 net of any credits with interest; consequential damages $1000.

until paid,

$ 13.00 costs, and $ attorney's fees.

☐ Open Account ☐ Contract ☐ Note ☒ Other (EXPLAIN) sold me 5 unmerchantible tires.

Homestead Exemption waived? ☐ yes ☐ no ☐ cannot be demanded

8-28-84 James A. Belew Jr.

CASE DISPOSITION

JUDGMENT that Plaintiff(s) recover against ☐ named Defendant(s) ☐

$ net of any credits with interest;

$ until paid.

$ costs, and $ attorney's fees.

Homestead Exemption waived? ☐ yes ☐ no ☐ cannot be demanded

☐ JUDGMENT FOR ☐ NAMED DEFENDANT ☒ JUDGMENT FOR DEFENDANT ON MOTION TO STRIKE

☐ NON-SUIT ☐ DISMISSED

Defendant(s) present? Yes ☒ No ☐

January 2, 1985 _____

9-24-84 84-18977

BILL J. CORY

2574 Chain Bridge Rd

Vienna, VA 22180

V.

UNIROYAL, INC

Serve: Calvin P. Major

200 West Grace st

Richmond, VA 23220

WARRANT IN DEBT

TO DEFENDANT You are not required to appear; however, if you fail to appear, judgment may be entered against you.

CONTESTED CASES.

☐ will be heard on return date.

☐ will be set for later date

Bill of Particulars GRANTED DENIED

Grounds of Defense GRANTED DENIED

ATTORNEY FOR PLAINTIFF(S)

ATTORNEY FOR DEFENDANT(S)

P 24